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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 935

MODERN PRODUCTS SUPPLY COMPANY,

Petitioner,

vs.

RICHARD E. DRACHENBERG,

Respondent.

**REPLY BRIEF OF MODERN PRODUCTS
SUPPLY COMPANY ON PETITION
FOR CERTIORARI**

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**RESPONDENT'S ARGUMENTS DO NOT
BEAR ANALYSIS**

1.

The assertion on page 2 of Respondent's brief that the decision in this case does not conflict with applicable decisions of this Court is believed to be contrary to fact. The decision in the instant case is in direct conflict with the four applicable decisions of this Court cited on page 10 of the petition for certiorari. This Court has repeatedly held that it is not invention to aggregate prior art features, each performing the same function which it performed in its original surroundings. It was expressly so stated in each of the four decisions mentioned under point 2 on page 10 of the petition. Yet, in the instant case, the Courts below have called it invention to aggregate two

wholly unrelated features each of which performs exactly as it did in the prior art. There is no more relation between the pulping device and the centrifugal strainer than there was when they were still in the prior art structures in which they are individually found precisely as claimed.

2.

In the instant case, both the District Court and the Circuit Court of Appeals have been satisfied to give mere "rubber stamp" approval of the conclusions reached by the Board of Appeals of the Patent Office. That this was the attitude of the Court of Appeals for the Sixth Circuit amply appears from the very quotation which Respondent has italicized near the top of page 10 of his brief, wherein the Court of Appeals for the Sixth Circuit dismissed the prior art by pointing out that similar references had been before the Board.

Yet the responsibility of the Courts is not at all the same as the practice of the Patent Office. It is the accepted practice of the Patent Office and its administrative appellate tribunals to resolve all doubts in favor of the applicant. The early case of *In re Thomson*, 120 O. G. 2756, explains the reason by pointing out that the doubt should be resolved in favor of the applicant's claim because no absolute right of property is conferred by the grant of a patent. By the grant of a patent a patentee is merely put in a position to assert his prima facie right against infringers who may in their defense raise the question of the validity of the patent and have the same finally adjudicated in the light of a full presentation and consideration of all the evidence. This practice still obtains:

"It may be added that in doubtful cases it is the

established rule in this Court to resolve the doubt in favor of the applicant."

In re Coykendall, Court of Appeals, D. C., 29 F (2d) 868, 870.

"Appellant is entitled, at least, to have any actual doubt resolved in favor of patentability."

In re Hahn, C. C. P. A., 12 Pat. Q. 106, 108; 55 F (2d) 483.

"Viewing the case as a whole we are of the opinion that there is at least sufficient doubt as to lack of patentability of appellant's claims as to require their allowance."

Ex parte Breer, C. C. P. A., 12 Pat. Q. 290, 292; 55 F (2d) 485.

"The familiar rule that any doubt which exists should be resolved in favor of the applicant is here applicable."

In re Kirschbraun, C. C. P. A., 7 Pat. Q. 132, 134.

This doctrine leaves the true test of validity to the Courts. The Courts have evaded their responsibility in this case by assigning to the decision of the Patent Office Board of Appeals an importance to which it is not entitled in view of the above rule. The most that Respondent can legitimately urge on the basis of the patent file is that the Examiner familiar with the art had no doubt that the claims were unpatentable and rejected them, but the Board of Appeals, entertaining some doubt, allowed them.

3.

Respondent's discussion of the subject of jurisdiction nowhere denies that the Court of Appeals was correct in stating that there were not, as of the date of its opinion,

"any other machines of this kind on the market except those involved in this case." (3 Rec. 1016) Elsewhere the Court of Appeals said in its opinion "Drachenberg and Plaintiff's imitation of Drachenberg are the only machines shown to be sold for the precise purpose." (3 Rec. 1021) In view of the injunction against Petitioner, it is therefore an established fact that the entire industry was, at the date of the decision sought to be reviewed, concentrated not only in the Sixth Circuit but in the hands of Respondent. The Court was not talking merely about the patented structure but about the entire industry in the manufacture of devices for the "precise purpose" (vegetable juice extraction).

This is the same situation which was present in the case of *Muncie Gear Works, Inc. vs. Outboard, Marine & Manufacturing Company*, 315 U. S. 759, where the Court was not interested in the general industry of manufacturing marine motors, but was interested in the specific industry of manufacturing outboard motors. Respondent's argument that mixers might be made elsewhere in the United States is entirely irrelevant. So also *might* outboard motors be made elsewhere. In the Muncie case the Supreme Court was interested in the situation *as it existed* at the time of the decision which it undertook for review at the time of the decision here presented for review, there were no manufacturers of vegetable juice extractors anywhere save in the Sixth Circuit.

4.

It is noted, moreover, that the ultimate jurisdictional issue with which this Court is concerned is whether it is likely that a patent dominating an industry will ever

again be presented to this Court for review. The question as to where the industry is concentrated is but evidence bearing on the broader issue. Therefore, Respondent's assertion that within a few days prior to a petition for certiorari it had discovered some unidentified devices made by other alleged infringers and caused notices to be sent to them is far from conclusive. The Court will note that the letters attached to Respondent's brief are by no means ordinary notices of patent infringement. Both of these letters rely more on the decision below than upon the patent and, particularly in view of the fact that one of the alleged infringers is offered a license, it is the obvious intent and desire of Respondent to use the favorable decision of the Sixth Circuit Courts as a club to avoid any further jeopardy to his patent. There is no statement by Respondent that under any circumstances is further litigation involving the patent likely. Nor does he offer evidence or even an assertion that the devices referred to in the letters attached to his brief are in fact devices for "the precise purpose" within the meaning of the opinion of the Circuit Court of Appeals here sought to be reviewed. In view of Respondent's contention that all centrifugal juicers are within his patent (see on page 5 of the petition), the alleged infringing devices to which the letters relate may be mere orange juicers so far as is here shown.

The fact remains therefore that so far as the *record* in this case discloses, the industry referred to by the Courts below is concentrated in the Sixth Circuit and nothing now sought to be added by Respondent's brief negatives the conclusion that it is unlikely that this Court will ever have an opportunity to review a patent which dominates the vegetable juice extractor industry, unless it does so by accepting jurisdiction in this case.

5.

Respondent's citation of *Williams vs. United Shoe*, 316 U. S. 364, is wholly irrelevant for the reason that the Court there found a true combination, and where there is a cooperative combination the applicable rule of law is wholly different from that which is pertinent to the present case in which the parts selected by Drachenberg from the prior art have no cooperative relationship.

The claims of the Drachenberg patent contemplate only a pulping device with off-center chute which effects pulping and throws the pulp outwardly exactly as did the pulping device of Steere, and a centrifugal juice extractor which receives the pulp and centrifugally strains the juice exactly as does the centrifugal strainer of Brophy. It would be impossible to conceive two pieces of apparatus which perform their functions with more complete independence.

6.

Respondent's attempt to divert this Court from the patent issue by talking about the relationship between the parties evidences

"a plain disregard of the public interest sought to be safeguarded by the patent statutes and so frequently present but so seldom adequately represented in patent litigation."

(*Muncie Gear Works vs. Outboard*, 315 U. S. 759, 768).

7.

Respondent states the Petitioner oversimplifies the problem.

The fact is that Respondent and not Petitioner stated the problem. Respondent worded the claims. All that Petitioner has done is to refer to the claims as Respondent worded them. If Respondent actually gets results superior to the devices of the prior art, the reasons for the superior results are not to be found in the claims at issue. Respondent's brief completely evades Petitioner's showing that on the basis of Respondent's claims as stated in the patent all that is called for is the Brophy Centrifugal strainer and the Steere pulping device.

Respectfully submitted,

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